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Supreme Court of the United States

October Term, 1972.

No. 72-1109

CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF RUSH, HENRIETTA, PITTSFORD and BRIGHTON, COUNTY OF MONROE, STATE OF NEW YORK; RICHARD E. TEN HAKEN, individually and as Superintendent of Schools; CARL ZIEGLER, RICHARD BOBBE, JAMES BREESE, CAROLYN McWILLIAMS, JOHN YOUNG and RANDALL CARTWRIGHT, all individually and as The Board of Education of Central School District No. 1, Towns of Rush, Henrietta, Pittsford and Brighton, County of Monroe, State of New York,

Petitioners,

v.

MRS. SUSAN RUSSO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1972.

No. .

CENTRAL SCHOOL DISTRICT No. 1, TOWNS OF RUSH, HENRIETTA, PITTSFORD AND BRIGHTON, COUNTY OF MONROE, STATE OF NEW YORK; RICHARD E. TEN HAKEN, individually and as Superintendent of Schools; CARL ZIEGLER, RICHARD BOBBE, JAMES BREESE, CAROLYN McWILLIAMS, JOHN YOUNG and RANDALL CARTWRIGHT, all individually and as The Board of Education of Central School District No. 1, Towns of Rush, Henrietta, Pittsford and Brighton, County of Monroe, State of New York,

Petitioners,

v.

MRS. SUSAN RUSSO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the District Court is set forth as an Appendix to the Petition at pages 16-21. The opinion of the Court of Appeals for the Second Circuit is reported at 469 F. 2d 623, and is reproduced as an Appendix to the Petition at pages 23-42.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

1. Is the non-disruptive, conscience-motivated action of a New York State public high school teacher who stands in respectful silence while the Pledge of Allegiance to the Flag is being broadcast over a public address system into her school homeroom, and being simultaneously repeated by a fellow teacher and the students, protected by the First Amendment?

2. Does the dismissal of that teacher under the aforesaid circumstances constitute a violation of the teacher's First Amendment-protected rights of free speech?

Statutes and Regulations Involved.

The relevant statutes and regulations are set forth at pages 3 through 5 of the Petition.

Statement.

Respondent Russo was appointed by petitioner school district to a three-year probationary term of employment as a public high school art teacher pursuant to *N. Y. Education Law*, §3012 (App. 29-30a). The employment relationship continued for the full probationary term and no annual renewal is required. Russo signed a loyalty oath when appointed. Teachers' duties relative to the Pledge of Allegiance (hereinafter "the Pledge") were not discussed before or at the time of Russo's hiring, at the orientation sessions for new teachers, or in the written teacher's manual (App. 29-30a, 36a; Pl. Ex. 5; 32-34a; Pl. Ex. 4; 34-35a).

The school day included a homeroom period where students reported each day for the taking of attendance

and other administrative functions. No instruction was scheduled for the homeroom period.

Russo was assigned to a senior high school homeroom, jointly with a teacher with seven years of experience in the district (App. 35a, 102a). The room contained a flag in a corner behind the teachers' desks. Each day the Pledge was broadcast into the homeroom (App. 37a, 124-125a) and Russo stood, turned to face the flag, and remained silent with her arms at her side in a respectful manner during the Pledge (App. 37-38a, 81a, 103a). The other homeroom teacher recited the pledge, together with most of the students, and all students knew the words of the Pledge (App. 37-38a, 81a, 103a).

Russo's silence during the Pledge was motivated by her belief that one's patriotism is best manifested by one's behavior, not by rote recitation. She further believed that the words "liberty and justice for all" were not accurate in the context of American life at this time, and that it would be hypocritical to recite those words. Russo never attempted to indoctrinate her pupils with her views (App. 39-40a).

A terse directive regarding teachers' duties during the Pledge was posted on the faculty bulletin board, and, although there is a question of fact as to whether Russo was aware of the directive, for the purpose of this memorandum it will be presumed that she knew, or should have known, of its contents. Although Russo never recited the Pledge from her first homeroom in September of 1969 onward, the school administration did not raise the issue for some eight months (App. 40a, 153-155a). Before her non-recitation of the Pledge was noticed by the administration, Russo received a favorable written evaluation from an assistant principal (App. 45-46a, 222a, 339a; Pl. Ex. 7).

On April 14, 1970, the Board of Education adopted a Pledge policy applicable to students allowing those who did not wish to recite the Pledge to remain respectfully seated. Shortly thereafter, Russo's principal observed her respectful silence during the Pledge (App. 18a). The following day the principal met with Russo and ascertained the reasons for her non-recitation. He advised Russo to reconsider her actions, but did not order her to recite or teach the Pledge (App. 41a, 152-153a). During April-June, 1970, the Board of Education received communications from parents concerning Russo's non-recitation of the Pledge, but did not direct the school administration to order Russo to take any action vis-a-vis the Pledge (App. 234a-245a, 259-260a) or to inform her that failure to repeat the Pledge would be insubordination or otherwise form the basis for dismissal. The Pledge issue was debated at the April 28, 1970 Board of Education meeting (App. 2, 27a, 368a).

The principal again observed Russo not saying the Pledge about May 1, 1970, and met with her again. He informed Russo that he was recommending that her probationary employment not be renewed. Russo asked if the non-recitation of the Pledge was the reason, but the principal refused to give a reason for his decision (App. 153-154a). The principal wrote to the Superintendent of Schools recommending Russo's dismissal (App. 350a; Pl. Ex. 17).

On May 12, 1970, the Board adopted more punative and restrictive regulations regarding students who did not recite the Pledge; yet the Board adopted no Pledge regulations applicable to teachers (App. 334-340a; Pl. Exs. 10-12). Russo commenced a grievance pursuant to the contract covering the school district's teachers, but received no reasons for her dismissal when the chief

school administrator refused jurisdiction of the grievance (App. 359a; Pl. Ex. 20). A second and less favorable evaluation of Russo's performance was written in June, 1970; however, she was not informed of its existence and it was not discussed with her, in violation of the Board of Education's contract (App. 47-50a, 347a; Pl. Ex. 16).

By the end of the school year, the Board of Education had taken no action with regard to Russo and the agenda for its June 23 meeting contained no mention of Russo. The Board ran entirely through the agenda on that night and then went into executive (secret) session where it remained closeted for several hours until after 1 a.m. When the Board emerged from its executive session, the members of the public in attendance, including Russo, had all left and the Board adopted its resolution to fire her. The Board did not afford Russo a chance to speak in her own defense, and neither the Superintendent's recommendation for dismissal, the Board's dismissal resolution, nor the notice to Russo give any reasons for the dismissal (App. 344-346a; Pl. Exs. 14-15). On the trial in District Court, petitioners attempted to raise as justification for its action the "ceramics teaching" incident, which involved a hypothetical statement by Russo made in the course of an Art Department meeting that she would not take a position for which she was not qualified (App. 96-97a, 167a, 213-214a). Russo never received nor refused an actual order to teach ceramics (App. 96-97a, 213-214a). The Board also raised Russo's failure to arrive at a hall monitoring position on one or two occasions owing to a scheduling mixup (App. 94-96a). However, board member Breese testified that Russo's non-recitation of the Pledge was a reason for her dismissal (App. 253a). Board member Cartwright testified that Russo's acts in standing silently during the Pledge were factors in her dismissal (App. 301a, 304a).

The Superintendent of Schools testified that Russo's non-recitation of the Pledge was a motivation in his recommendation for dismissal, and the Board gave great weight to that recommendation (App. 288a, 304a).

ARGUMENT.

This Court has consistently upheld the rights of public employees to freely exercise their First Amendment rights absent some urgent overriding public necessity for the limiting of those rights. The record demonstrates no such necessity. Russo's high school pupils knew the Pledge, and the co-homeroom teacher always recited the Pledge, which was broadcast into the homeroom as well. 36 *U. S. C.* §172 provides that standing silently at attention during the pledge shows full respect for the flag and no Federal laws mandate recitation of the Pledge. *The Regulations of the New York Commissioner of Education* §108.5 do not mandate teaching or recitation of the Pledge, but advise that secondary school pupils "* * * be guided in sober thought as to the meaning of 'liberty and justice for all.'" Russo met those duties. The Record does not manifest any attempts by Russo to indoctrinate her pupils, nor any disorder resulting from her non-recitation. Such rote teaching is no longer considered by most educators to be educationally sound and rote recitation of the 31 words of the Pledge seems to be a poor method of instructing high school students concerning the citizen's complex relationship with his country.

The Court of Appeals was correct in rejecting the Finding of Fact by the District Court that Russo's dismissal was motivated in part by her refusal to teach a course (the ceramics teaching incident), her failure to perform all duties and her involvement of her students in her controversy. The Record reveals that the ce-

ramics incident involved a discussion among teachers, including Russo, concerning the hiring of a ceramics teacher. Russo made the hypothetical remark in the course of her duties as a representative of the art department that she would not teach ceramics if she had no training in that field. She was never ordered to teach, and she never refused to teach, a ceramics course. The Record further reveals that Russo actually discouraged students from involving themselves in her dismissal. The only other alleged failure of Russo to perform duties developed in the Record concerned a trivial failure, owing to a misunderstanding, to perform hall monitoring duties on one or two occasions. There can be no doubt that the non-recitation of the pledge was the motivating reason for her dismissal and that, in taking its action, the Board of Education relied on no federal or state law requiring teachers to participate in the pledge, but stood upon its own claim of absolute power.

POINT I.

The decision of the Court of Appeals is clearly correct and in accord with applicable precedent.

The decision below wisely continues the policy of this Court in assiduously protecting the rights of free speech of public employees, especially teachers. Petitioners failed below to establish a public interest in coercing Russo to recite the Pledge sufficient to override Russo's First Amendment—protected rights to remain respectfully silent.

The right of free speech in the schools in connection with the Pledge was established in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943).

Barnette goes beyond the rights of the students involved, and protects all citizens against state-imposed political dogma:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or for citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> "We think the action of the local authorities in compelling the flag salute and the pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control" (p. 642).

This broad protection is as applicable to teachers as to students, especially in light of later decisions of This Court. The decision below (Petition, p. 23, at p. 42) relied heavily upon the quoted language from *Barnette*.

In *Wieman v. Updegraff*, 344 U. S. 183 (1952), This Court protected the right of a public college teacher to refrain from signing a loyalty oath, after balancing the state interest in protecting itself from subversion against the individual's right not to be excluded from public employment on arbitrary grounds (p. 188). *Wieman* held that "• • • the flow of democratic expression and controversy • • •" was more important than the state's alleged interest. Similarly, in *Sweezy v. State of New Hampshire*, 354 U. S. 234 (1957), This Court protected the right of a state-employed professor to refrain from answering questions which might "• • • impinge upon such highly sensitive areas as freedom of speech

• • • [and] freedom of communication of ideas" (p. 245). See also *Barenblatt v. United States*, 360 U. S. 109 (1958). A silent, peaceful protest was also given First and Fourteenth Amendment protection in *Brown v. State of Louisiana*, 383 U. S. 131 (1966).

In *Garrity v. State of New Jersey*, 385 U. S. 493 (1967), This Court stated at page 497 that speech coerced by threatened loss of public employment was "• • • the antithesis of free choice to speak out or remain silent," and held that public benefits may not be conditioned on the relinquishing of First Amendment rights (p. 500). Russo did not withhold information or refuse to provide information relative to her political loyalty. In fact, she freely signed a loyalty oath (App. 36a; Pl. Ex. 5). Russo's act of non-speech was an innocent abstention from the rote and unthinking recitation of a Pledge, the value of which as an expression of loyalty or as a teaching tool is debatable. Russo's non-conforming but dignified behavior demonstrated more respect for flag, country and the fundamental rights of others than does the mumbled recitation of a catechism rendered meaningless through innumerable unthinking repetitions.

This Court has also protected the right of teachers to speak out, even in a manner embarrassing to their employers. In *Pickering v. Board of Education*, 391 U. S. 563 (1968), a public school teacher wrote a letter to a newspaper inaccurately criticising his school administration. This Court, at page 568, rejected the concept that school teachers may be compelled to relinquish First Amendment rights that they would otherwise enjoy as citizens to comment on matters of public interest. Similarly, Russo's refusal to recite a Pledge that she did not view as accurately reflecting current American life can be viewed as a protected right to comment on public

affairs. Her refusal to recite was not a refusal to teach; she was never ordered by petitioners to teach the Pledge which all of her students already knew (App. 38a). Russo's actions were further protected under *Pickering*, which held that a lack of proof that Pickering's actions caused friction with other teachers supported his rights to speak out. The record does not reveal any friction with other staff members or students caused by her actions and the record is totally lacking in any proof of interference with the functioning of the schools.

Similarly, in *Sherbert v. Verner*, 374 U. S. 398 (1963), a public employee's First Amendment rights were protected unless the state could show more than "a colorable state interest" in limiting those rights; instead, the state had to demonstrate "• • • only the gravest abuses, endangering paramount interests • • •" (p. 406). It is hard to imagine a paramount interest by Petitioners herein in having a teacher of high school students join with the students in the rote recitation of a familiar 31-word Pledge, especially in the absence of any proof in the Record of resulting damage to her pupils.

New York courts have protected free speech rights of public school teachers. In *Matter of Tischler v. Board of Education*, 37 A. D. 2d 261 (2nd Dept. 1971), the Appellate Division held that statutory tenure may not be denied "• • • for the purpose of retaliating against a teacher from exercise of constitutional rights • • •" unless an "overriding" governmental interest could be shown (at p. 264). In *Puentes v. Board of Education*, 24 N. Y. 2d 996 (1969), New York's highest court, relying in part on *Pickering*, annulled the disciplining of a teacher who promulgated a caustic letter criticising the school administration. The New York Commissioner of Education, given quasi-judicial powers in educational matters by *N. Y. Education Law*, §310, recognized con-

stitutionally protected rights of teachers to individual freedom absent overriding public interests in *Matter of Collins*, 9 Ed. Dept. Reps. 52 (1969) (protecting the rights of a teacher to wear his hair in a certain fashion). Similarly, Maryland's highest state court annulled the dismissal of a teacher who refused to recite the Pledge in *State v. Lundquist*, 262 Md. 534, 278 A. 2d 263 (1971). A case almost identical to this case was decided in favor of the teacher in *Hanover v. Northrup*, 325 F. Supp. 170 (D. Connecticut 1970). In cases such as *Keefe v. Geanakos*, 418 F. 2d 359 (1st Circ. 1969), the First Amendment right of a teacher to present controversial material to a high school class has been upheld.

Tinker v. DesMoines Independent School District, 393 U. S. 503 (1969), afforded First Amendment protection to the right of public school students, slightly younger than the students in Russo's homeroom, to wear black armbands to school in protest against the Vietnam war. *Tinker's* general guidelines for the exercising of school authority limiting First Amendment rights are based on evaluations of the state's interest in maintaining order in the schools. *Tinker* limited such authority at pages 507-508 to "• • • reasonable regulation of speech-connected activities in carefully restricted circumstances."

The protection afforded to students in *Tinker* was extended to teachers in *James v. Board of Education*, 461 F. 2d 566 (2nd Circ. 1972), cert. den. U. S. (Dec. 6, 1972). James was a public school teacher who wore a black armband to class on a Vietnam moritorium day, contrary to specific orders from his superiors. James, while performing his teaching duties, by his appearance expressed his personal view of a political matter, and surely many of his students knew that the armband signified disapproval of the Vietnam war. Yet

the Second Circuit reversed James' dismissal, and this Court did not choose to grant certiorari. Russo's act of remaining silent carried no specific or identifiable message, and there is no evidence that Russo was using her teaching position to influence her pupils. Russo made no attempt to indoctrinate or proselytize her students, and the modest nature of her individual non-conformity is perhaps best illustrated by the fact that it went unnoticed by school authorities from September until April.

The fact that Russo's silence was motivated by conscience and not by any religious belief does not take the case outside of the principles established by *Barnette, Tinker* and *James* since the First Amendment does not limit the guarantee of free speech to speech motivated by religious conviction. Indeed, it does not appear that the students in *Tinker* were acting for religious reasons.

The petition correctly argues at pages 8-9 that a school district may lawfully exercise substantial discretion in controlling school affairs; however, this discretion must be exercised within the framework of the constitutional guarantees which protect the citizen from government. In this regard, the power of a local board of education is certainly not greater than that of other levels or divisions of government. On the trial petitioners were unable to demonstrate any actual or threatened disruption or other adverse impact on school affairs flowing from Russo's respectful silence during the Pledge. Emotional fears of anticipated disorder based on conjecture and speculation and not supported by any factual proof were held insufficient to justify a restriction on First Amendment rights in *Tinker*, citing *Terminiello v. Chicago*, 337 U. S. 1 (1949).

First Amendment rights to make controversial statements or teach controversial subjects in school have also been upheld by this Court. This Court struck down restrictions on teaching Darwinian evolution in *Epperson v. Arkansas*, 393 U. S. 97 (1968), holding that "• • • laws that cast a pall of orthodoxy over the classroom" will not be tolerated, citing *Keyishian v. Board of Regents*, 385 U. S. 589 (1967). *Epperson* also cited *Meyer v. Nebraska*, 262 U. S. 390 (1923), which struck down a statute forbidding the teaching of classes in a foreign language to elementary students. Russo's silence did not present the problems of the magnitude of affirmative controversial speech in the schools. The state's power to control the schools is not limitless, and the decision below was correct in holding that the Board of Education was limited in its power to abridge Russo's First Amendment rights.

The Commissioner of Education of New York State has ruled that high school students may refrain from reciting the Pledge, and may not be required to obtain parental approval for such acts, since such students "• • • are of sufficient age to make their own judgments in matters of conscience" (*Bustin v. Board of Education*, 10 Ed. Dept. Reps. 168 [1971]). *Bustin* accords with *Tinker*, and the Commissioner's *Regulations* §108.5 (8 *N. Y. C. R. R.* §108.5) only requires that high school students be guided in sober thought as to the meaning of liberty and justice for all. There is no compelling state interest sufficient to override Russo's First Amendment rights in forcing Russo to recite a Pledge when her pupils could freely and legally refuse to join in the recitation and when state regulations and Federal law do not mandate such rote recitation. However, *Tinker* holds that pupils have First Amendment rights analagous to the right to remain respectfully silent during the

Pledge. Teachers' rights to free speech should be as broad as those of their students as held in the opinion of the court below. That holding is in accord with logic and precedent. To present students with the spectacle of a teacher having free speech rights more limited than their own would seem to undermine, not forward, the state's interests in school discipline and decorum, and ultimately in a free and informed electorate.

While cases involving prepublication restraint of speech are not identical to the case at bar, they are closely analagous and it would seem that the standards there established are applicable here. In prepublication restraint cases, the courts require a factual showing of a clear and immediate threat of irreparable injury before speech will be enjoined. The New York Court of Appeals and this Court have both recently spoken emphatically to protect private rights against government restraint.

In *Board of Education of Union Free School District No. 3, Town of Brookhaven, et al., v. National Education Association of the United States, et al.*, 30 N. Y. 2d 938, reversing 37 App. Div. 711, the New York Court of Appeals adopted the dissenting opinion of Justice Hopkins in the Appellate Division which said *inter alia* at page 711, *et seq.*:

> "Regulations aside, there is no power in government under our Constitution to exercise prior restraint of the expression of views, unless it is demonstrable on a record that such expression will immediately and irreparably create injury to the public weal—not that such expression, without itself being unlawful, will incite criminal acts in others (*Matter of Rockwell v. Morris*, 12 A. D. 2d 272, 277-278, affd. 10 N. Y. 2d 721, cert. den. 368 U. S. 913). • • •

> "A balance between individual rights of freedom and the public interest in maintaining the efficiency of the school system must be recognized (*Pickering v. Board of Educ.*, 391 U. S. 563). But the burden is always on the State to prove that the action to be restrained would materially interfere with the necessary operations of a public function (cf. *Tinker v. Des Moines School Dist.*, 393 U. S. 503, 506, 512-513)."

This Court, in *New York Times v. United States*, 403 U. S. 713 (1972), denied injunctive relief where the government had failed to demonstrate that disclosure of the contents of classified documents would surely result in direct, immediate and irreparable damage to the nation.

The Board of Education has totally failed to prove that Russo's conduct constituted a clear and immediate threat of irreparable injury which would justify a limitation on her constitutional right to free speech, and its action in dismissing Russo for her silence is an unlawful invasion of her First Amendment rights. The mainstream of constitutional law overwhelmingly flows on the course of protection for the First Amendment rights of teachers and all other citizens. There is no need to grant certiorari in this case, which follows the great majority of modern precedents.

POINT II.

The Court of Appeals correctly made new findings of fact.

The District Court made findings of fact that Russo's employment was terminated owing to "* * * her failure to follow school regulations, her refusal to teach a course

in the art department, her lack of cooperation, her refusal to participate in the Pledge of Allegiance, her failure to perform all duties, and her involvement of the student body in her conflict with the school" (App. 322a). The Court of Appeals properly reviewed and rejected these findings of fact, which were described as "cryptic" (Petition, pp. 30-31).

The Court of Appeals cited the requirement of Rule 52 (a), *F. R. Civ. P.*, for a high degree of specificity in fact finding in First Amendment cases, and for the Court of Appeals' right to correct "clearly erroneous findings of fact" (Petition, pp. 31-32). In *United States v. United States Gypsum Co.*, 333 U. S. 364 (1948), This Court rejected various findings of fact of the District Court sitting without a jury, and stated (p. 395) that a finding is "clearly erroneous" when "* * * although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The Court of Appeals herein reversed the finding of fact below that Russo was dismissed in part owing to her refusal to teach a ceramics class, on the grounds that the finding was clearly erroneous. That conclusion is supported by the Record. The Principal of Russo's school testified that the ceramics incident concerned the qualifications *not* of Russo but of a newly hired art teacher. The matter was discussed by the Principal and three representatives of the teachers, including Russo (App. 151a). During this discussion, Russo stated that she would not teach a course in ceramics (App. 150a). Russo was merely speaking hypothetically to express the more general idea that she would not take a job for which she was not qualified, with the implication that the newly hired teacher was also not qualified

to teach ceramics (App. 97a, 149-151a). The Principal and Russo both testified that Russo was never offered a ceramics teaching assignment, and consequently never refused to accept such an assignment (App. 96a, 150a). The art department was fully staffed for the 1970-71 school year (App. 163a). Thus, the Court of Appeals properly decided that the Finding of Fact that Russo was terminated in part owing to her refusal to teach a course which had never been assigned or even offered to her was clearly erroneous.

The Court of Appeals also properly held that the vague District Court findings of fact that Russo had failed to follow school regulations, had shown a lack of cooperation, and had failed to perform all duties all referred to the one real ground for Russo's dismissal —her actions in not reciting the Pledge (Petition, pp. 32-33). An incident involving Russo's failure to report for hall monitoring duty because of some scheduling confusion was properly dismissed by the Court of Appeals as a "trivial occurrence." Most teachers were confused about their hall monitoring duties after a schedule change (App. 96-97a). Russo only missed hall duty once or twice, never refused to perform the duty, and appeared at all times for hall monitoring duty after the initial confusion was dissipated (App. 208a, 227a). Board members Breese and Cartwright did not even recall at the trial that hall monitoring was one of the bases for Russo's dismissal considered by the board (App. 254-255a, 301-302a).

Clearly, Russo's exercise of her First Amendment rights was the overriding reason for her dismissal; all the rest was mere afterthought and deceptive gloss designed to conceal the real and unlawful reason for the action. Board members Breese and Cartwright both

testified that Russo's non-recitation of the Pledge was a major reason for the Board of Education's actions in dismissing her (App. 254-255a, 301-302a, 304a). Principal Loughlin testified that his reference to Russo's insubordination and refusal to follow school regulations in his recommendation for her dismissal were based upon her act in not reciting the Pledge (App. 188-189a, 197a). The Superintendent stated that Russo's failure to recite the Pledge was a factor in his recommendation for her dismissal (288a). This Court refused to grant certiorari in the analogous case of *James v. Board of Education*, 461 F. 2d 566 (2nd Circ. 1972), even though James had clearly been insubordinate in wearing a black armband.

No student disorders arose in connection with Russo's actions that would permit limitation of her First Amendment rights under *Pickering* or *Tinker, supra.* Any student unrest was based upon *students'* duties vis-a-vis the Pledge and the contemporaneous Kent State incident (App. 142-144a, 169a). Russo's dismissal was discussed by students speaking with permission of the principal at lunchtime, but no disorder ensued (App. 184-185a). Russo attempted to stop even this limited discussion of her situation (App. 89-90a).

Thus, the Court of Appeals was correct in making new findings of fact that Russo's activities in not reciting the Pledge were the sole ground for her dismissal (Petition, pp. 34-35). Even if we assume *arguendo* that other grounds for dismissal existed, the limitations on Russo's First Amendment rights were so interwoven in the dismissal procedure that the decision below was fully justified. This Court recently affirmed its prior holding that even non-tenured public school teachers may not be subjected to dismissal predicated on the exercise of First Amendment rights (*Perry v. Sindermann*, 408 U. S. 598 [1972]).

Under the test set forth in *United States v. United States Gypsum Co.*, 333 U. S. 364 (1948), the Court of Appeals was justified by the evidence in making the finding that the Pledge issue was the basis for Russo's dismissal. Sparse and conclusory findings of fact, such as those made by the District Court herein, were also found not to comply with Rule 52, *F. R. Civ. P.* in *C. I. R. v. Duberstein*, 363 U. S. 278 (1960). *Kelley v. Everglades Drainage Dist.*, 319 U. S. 415 (1943), held that the findings of fact had to be sufficient to indicate the factual basis for the ultimate conclusion; otherwise, the appellate court had the right to review the findings of fact. The central issue in this case is the degree that Russo's dismissal was predicated upon her exercise of First Amendment rights. The findings of fact of the District Court were shockingly deficient in precisely that area. The District Court did not adequately distinguish between alleged insubordination and lack of cooperation based upon Russo's Pledge-related activities and insubordination based on other teaching considerations. Consequently, the Court of Appeals made a new finding, amply supported by references to the Record, that Russo's refusal to recite the Pledge was the basis for her dismissal. Such fact-finding was correct and does not provide a basis for granting the Petition for Certiorari herein.

Even if the findings of the District Court that Russo was dismissed for reasons other than non-recitation had some support in the Record, the Court of Appeals could have made new findings of fact under the "clearly erroneous" test of *United States v. United States Gypsum, supra* (see also, *United States v. Singer Manufacturing Co.*, 374 U. S. 174, 195 [fn. 9]). As discussed above, Russo's alleged "insubordination" was related by her principal to her activities relative to the Pledge.

The sequence of events supports the Court of Appeals' finding that non-recitation of the Pledge was the real reason for Russo's dismissal. She did not recite the Pledge for eight consecutive months (App. 37-38a, 81a, 103a), yet the administration first raised the Pledge issue about May 1 (App. 41a, 152-153a). This decision to discuss the Pledge with Russo was contemporaneous with two board of education meetings on April 28 and May 12, 1970. At the first meeting, the liberal board policy regarding Pledge recitation by students was criticized and debated. At the board meeting of May 12, the board adopted much harsher regulations dealing with students not reciting the Pledge (App. 327a, 340a; Pl. Exs. 11, 12). It is clear that the school authorities were satisfied by Russo's performance (Pl. Ex. 7) until it was discovered that she was silent during the Pledge. Then, in the environment of heated public debate regarding student rights and the Pledge, the witch hunt for reasons to justify Russo's dismissal ensued. As the Court of Appeals noted (Petition, p. 32, fn. 8), Russo received a good evaluation immediately prior to the Pledge dispute (App. 45-46a, 222a; Pl. Ex. 7) and a bad (and secret) evaluation after the Pledge issue developed (App. 47-50a). The relationship between the Pledge issue and the dismissal is obvious.

The new finding of fact by the Court of Appeals, being well supported by the Record, does not in itself justify the granting of certiorari.

In *NLRB v. Pittsburgh S. S. Co.*, 340 U. S. 498 (1951), a Court of Appeals reversed an NLRB decision owing to its belief that the record was not supported by substantial evidence. Mr. Justice Frankfurter stated at page 503:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fairminded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' *Federal Trade Comm'n v. American Tobacco Co.*, 274 U. S. 543, 544, 47 S. Ct. 663, 71 L. Ed. 1193."

We respectfully suggest that this Court should apply the same criteria herein and deny certiorari.

Petitioners rely heavily on *Zenith Radio Corp. v. Hazeltine Research*, 395 U. S. 100 (1969). *Zenith* did reiterate the test of *United States Gypsum*, allowing the appellate court to consider the entire evidence and then determine whether or not a mistake was made (p. 123). The *Zenith* decision was based in part on the peculiar problems of proof inherent in a treble-damages case. This Court said at page 123:

> "• • • damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts."

Conversely, the Record in this case is relatively simple. Moreover, the new finding of fact by the Court of Appeals did not hinge on questions of the relative credibility of witnesses, merely upon the conclusion drawn from an analysis of the testimony as a whole.

Furthermore, no damages have been assessed by the Court of Appeals and presumably the remand to the District Court was ordered for the purpose of proof on the question of damages.

The Court of Appeals acted correctly in making new findings of fact as to the reason for Russo's dismissal.

CONCLUSION.

Respondent respectfully requests that the petition for certiorari be in all respects dismissed.

Respectfully submitted,

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